

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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77-2033

To be argued by
ETHAN LEVIN-EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2033

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH ADDOLORIA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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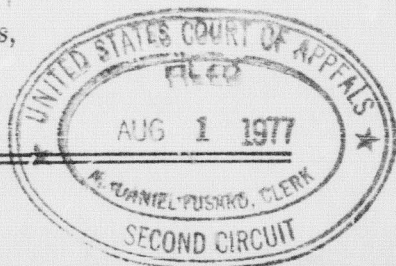


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Docket No. 77-2033

UNITED STATES OF AMERICA,

Appellee,

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JOSEPH ADDOLORIA,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Joseph Addoloria appeals from an order of the United States District Court for the Eastern District of New York (Platt, J.) entered on February 28, 1977, which denied appellant's motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure and T. 28 U.S.C. § 2255, to "vacate and correct" the sentence imposed on him by that Court on November 21, 1975.

The sole issue on this appeal is whether the district court erred in denying appellant's motion.

Statement of the Case

1. Facts

Appellant was found guilty, after a jury trial, of the crimes of theft of goods traveling as part of an interstate shipment, in violation of 18 U.S.C. § 659; con-

spiracy to commit this theft, in violation of 18 U.S.C. § 371; and unlawfully carrying and using a firearm during the commission of the afore-mentioned federal felonies, in violation of 18 U.S.C. § 924(c)(1) and (2). On November 21, 1975, appellant was sentenced to a term of nine years on the theft offense, five years on the conspiracy and nine years for the weapons charge. The first two terms were imposed concurrently and the third was suspended with appellant being placed on probation for five years, to commence when his incarceration was completed. The jail terms were imposed pursuant to 18 U.S.C. § 4208(a)(2).¹

Appellant's conviction was affirmed without opinion by this Court on February 25, 1976² and on April 27, 1976 he surrendered to begin serving his sentence.

Appellant was given an initial parole hearing in August, 1976, at which time he was continued to October, 1976. At a second parole hearing (in October, 1976) he was continued to October, 1978.

On January 28, 1977 appellant filed the § 2255 motion which is the subject of this appeal.³

2. The District Court's Decision

On February 28, 1977, Judge Platt, in a written Memorandum and Order, denied appellant's motions finding, *inter alia*, as follows:

"Petitioner argues herein that in imposing sentence pursuant to § 4208(a)(2) the Court con-

¹ Now 18 U.S.C. § 4205(b)(2).

² *United States v. Mastrangelo, et al.*, 75-1411.

³ On February 7, 1977 the United States Attorney's Office was advised by Judge Platt's chambers that the Court did not feel that a Government response was necessary.

templated that he would be paroled 'at least by the completion of one-third of his term.'

In *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975), the Second Circuit discussed at length the development of the parole guidelines that petitioner contends frustrate the Court's intent in sentencing him pursuant to § 4208(a)(2). The guidelines were adopted in November, 1973. 38 Fed. Reg. 31912 (1973). The regulations were revised following the decision in *Grasso v. Norton*, 371 F. Supp. 171 (D. Conn. 1974) (Grasso I); 39 Fed. Reg. 20028 (1974); see 28 C.F.R. § 2.14(b). These revised regulations were upheld in *Grasso v. Norton*, 520 F.2d 27 (2d Cir. 1975) (Grasso II).

Contrary to petitioner's contention, in sentencing him pursuant to former § 4208(a)(2), the Court fully intended to give the parole authorities the discretion provided for in the statute to determine petitioner's release date" (emphasis added).

ARGUMENT

The District Court's Order Was Correct.

Appellant contends, first, that the Parole Commission's administrative policies regarding so-called "(a)(2)" prisoners undermines the intent of Congress and, second, that Judge Platt was operating under a "materially untrue assumption" of fact when he imposed the sentence on him. For these reasons, appellant argues,

his sentence should be vacated and the case remanded for resentencing. The contentions are frivolous.⁴

Approximately four months after appellant began serving his sentence, imposed under 18 U.S.C. § 4208 (a) (2), he received a prompt initial parole hearing but was denied parole because the Guidelines for his "offense behavior" and his "salient factor score" required that the term he serve be within a range of 36 to 48 months before he would be considered eligible for parole. (Appellant's Brief at 5). Thereafter, in October, 1976, well before the one-third mark, appellant received a second in-person hearing by the parole examiners, as now required for an "(a) (2)" prisoner under 28 C.F.R. § 2.14(e) (effective October 6, 1975). This is the same kind of hearing given to prisoners sentenced under section 4202. Following this hearing, held in October, 1976, appellant was again denied parole and his case continued to October, 1978, which will still be approximately six (6) months less than the one-third point in his sentence. We submit that these two in-person hearings, both held well within the one-third period, amply satisfied the expectation of the sentencing Court and fully complied with section 4202(a) (2). Accordingly, the petition was meritless and was properly denied.

⁴ Although argued below—since the Government was not asked for answering papers—we contend that appellant's claim is not cognizable in a section 2255 proceeding. Although the question is open in this Circuit, it is our position that section 2255 does not grant jurisdiction over a post-conviction claim, such as that asserted here, which attacks the execution rather than either the imposition or the validity of a sentence. The proper remedy is 28 U.S.C. § 2241. See *Thompson v. United States*, 536 F.2d 459 (1st Cir. 1976); *United States v. DiRusso*, 535 F.2d 673 (1st Cir. 1976); *Lee v. United States*, 501 F.2d 494 (8th Cir. 1974); *Robinson v. United States*, 474 F.2d 1085 (10th Cir. 1973); *contra*, *United States v. Salerno*, 538 F.2d 1005 (3d Cir. 1976); *Kortness v. United States*, 514 F.2d 167 (8th Cir. 1975). But see *United States v. Banks*, 553 F.2d 37 (8th Cir. 1977).

As noted by appellant, the controlling authority is *Grasso v. Norton*, 520 F.2d 27 (2d Cir. 1975). (Appellant's Brief at 16). The *Grasso* Court considered a claim that the treatment of Grasso by the United States Board of Parole defeated the sentencing court's intention: Grasso was sentenced on February 13, 1973, to a prison term of three years pursuant to Section 4208(a)(2). Thereafter, under a pilot project, parole guidelines were used by the Board of Parole at the time of Grasso's initial in-person hearing. Applying the guidelines which had not been in existence when sentence was imposed, the Board denied Grasso parole and continued him to the expiration of his term. A writ of habeas corpus was filed and ultimately Grasso was given a file review on March 1, 1974, the one-third point. Although for procedural reasons this Court affirmed granting the writ,³ it held that section 4208(a)(2) is fully satisfied by an initial in-person institutional hearing and a later file review at the one-third point.

Following the *Grasso* decision, the Board of Parole established new regulations for an (a)(2) prisoner and provided for an in-person hearing at the one-third point. 28 C.F.R. § 2.14(e) (effective October 6, 1975, 40 Fed. Reg. 41328 [September 5, 1975]). This regulation met any lingering objections to the treatment of (a)(2) prisoners. See *United States v. Grasso*, *supra* at pp. 38-40 (Feinberg, J., concurring and dissenting).

Since appellant has had both an initial institutional hearing and a second in-person hearing well before the one-third point, he has certainly been given meaningful consideration by the Parole Commission as contemplated by the sentencing Court and by section 4208(a)(2).

³ Under the peculiar circumstances of the case the writ remained in force and effect (520 F.2d at pp. 37-38).

Thus there has been no noncompliance with the intent of Congress as expressed in section 4208(a)(2).⁹

Moreover, there has likewise been no frustration of the intent of the district court which imposed sentence. Indeed, to contend that Judge Platt was operating under a "materially untrue assumption" of fact is disingenuous. Contrary to appellant's statement, the guidelines had been published before the sentence in this case was imposed. The court certainly was imposing sentence with an awareness of the published guidelines. Indeed, in his Memorandum Order, Judge Platt stated that "[c]ontrary to petitioner's contention, in sentencing him pursuant to former § 4208(a)(2), the Court fully intended to give the parole authorities the discretion provided for in the statute to determine petitioner's release date." *Compare Wright v. United States Board of Parole*, Dkt. No. 76-2454 (6th Cir. June 13, 1977).

⁹ The fact that he has not been granted parole is not a proper matter for a District Court's consideration. Section 4208(a)(2) mandated meaningful early parole consideration; it did not require early release. See *Kramer v. United States*, 409 F. Supp. 1402, 1404 (N.D. Ga. 1976); see also *Bailey v. Holley*, 530 F.2d 169, 175-176 (7th Cir. 1976) (granting an (a)(2) prisoner a second hearing well within the one-third point constitutes compliance with Section 4208(a)(2)). And it is simply preposterous to contend that he has not received meaningful parole consideration: Under both the District Court and Court of Appeals *Grasso* decisions, appellant, having been afforded two in-prison hearings well before the one-third point, has been given all the consideration to which he is entitled. There is absolutely no authority for the proposition, apparently asserted here, that appellant is entitled to three in-person hearings by the time the one-third point in his sentence is reached. Appellant cites the decision in *Garafola v. Benson*, 505 F.2d 1212 (7th Cir. 1974), in support of the proposition that "serious consideration" must be given prior to the one-third point. The *Grasso* decision leaves no doubt but that such "serious" or "meaningful" consideration is afforded where, as here, two inperson hearings have taken place prior to the one-third point.

There being neither frustration of Congressional intent nor a sentence imposed on the basis of a "materially untrue assumption" by the district court, it is clear that appellant is merely challenging execution of his sentence, a challenge that cannot be mounted under section 2255. See *Bradley v. United States*, 410 U.S. 605, 611 n.6 (1973); *United States v. DiRusso*, 535 F.2d 673 (1st Cir. 1976); *D'Allesandro v. United States*, 517 F.2d 429 (2d Cir. 1975); *Tarlton v. Clark*, 441 F.2d 384 (5th Cir.), *cert. denied*, 403 U.S. 934 (1971). Accordingly, the district court's order of denial was correct.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

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* The United States Attorney's Office wishes to express its appreciation to Scott Himes, a third year student at Hofstra University School of Law, for his assistance in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of August 1977 he served a copy of the within

Brief for The Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Harold L. Goerlich, 380 North Broadway, Jericho, N.Y. 11753

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Dolores Byrd

Sworn to before me this

2nd day of August 1977

Barbara A. Allen

BARRARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979